In the Supreme Court of the United States.

OCTOBER TERM, 1916.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Nashville, Chattanooga & St. Louis Railway, and Louisville & Nashville Terminal Company, appellants,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, City of Nashville, Traffic Bureau of Nashville, and Tennessee Central Railroad Company, appellees.

No. 290.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NASHVILLE DIVISION OF THE MIDDLE DISTRICT OF TENNESSEE.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

Appellants instituted this suit in the District Court of the United States for the Middle District of Tennessee to enjoin the enforcement of an order

of the Interstate Commerce Commission requiring them to discontinue practices which discriminated against the Tennesse Central Railroad Company in the interchange of competitive traffic at Nashville, Tennessee, in violation of section 3 of the Act to Regulate Commerce (24 Stat. 379, 380). Upon the hearing, a motion for an interlocutory injunction was denied and the petition dismissed. (Rec. Vol. I, p. 59, 227 Fed. 258.) An appeal was taken and, upon being docketed in this court, motion made for an order maintaining the status quo pending the appeal. This motion was denied on November 29, 1915.

STATEMENT OF FACTS.

Nashville, Tennessee, is served by three railroads, the Louisville & Nashville Railroad, the Nashville, Chattanooga & St. Louis Railway, and the Tennessee Central Railroad. Though the Louisville & Nashville owns 71 per cent of the stock of the Nashville, Chattanooga & St. Louis Railway, they are natural competitors for Nashville traffic, and each competes with the Tennessee Central. (Rec. Vol. II, 572, 575.)

The Louisville & Nashville Terminal Company was organized in 1893, and the Louisville & Nashville became the owner of its entire capital stock. All of the facilities which were owned by the Terminal Company were leased by it to the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway in 1896.

Prior to 1900 the Louisville & Nashville and the Nashville, Chattanooga & St. Louis railroads operated separate terminals under reciprocal switching arrangements, by which each switched cars for the other to and from their local destinations at a uniform charge of $2 per car (Rec. Vol. II, p. 390), which charge was absorbed on competitive traffic. (Rec. Vol. II, p. 575.)

In 1900 the two railroads created an unincorporated organization, styled "The Nashville Terminals," for the maintenance and operation of their terminal facilities at Nashville, to be operated as such, under the management of a board of control, consisting of a superintendent of the terminals and the general managers of the two railroads, the expenses to be apportioned between the two roads in proportion to the number of cars and locomotives handled for each company. (Rec. Vol. II, p. 378 et seq.)

The long-anticipated entrance of the Tennessee Central into Nashville became a fact in 1902, despite the strenuous opposition of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis Railroads. (Rec. Vol. II, pp. 298–9.) Prior to 1907 neither of these roads would interchange traffic with the Tennessee Central. In that year "in deference to public opinion" (Rec. Vol. II, p. 151) both roads began to furnish the Tennessee Central with switching service at Nashville on all except coal and competitive business. (Rec. Vol. II, p. 576.) In partial compliance with the order of

the Interstate Commerce Commission, upheld in *Louisville & Nashville Railroad Company* v. *United States* (238 U. S. 1), the switching service was extended to noncompetitive coal, but still denied to all competitive traffic.

The Louisville & Nashville and the Nashville, Chattanooga & St. Louis railroads filed terminal tariffs providing that " there is no switching charge to or from locations on tracks of the Nashville terminals, within the switching limits, on freight traffic, carloads, from or destined to Nashville " over either road, " regardless of whether such traffic is from or destined to competitive or noncompetitive points." (Rec. Vol. II, p. 576.)

These two railroads will handle competitive traffic for the Tennessee Central at local rates, but these rates, which vary from $7 to $36 per car (Rec. Vol. II, pp. 152, 154), are prohibitive.

Upon application and after hearing, the Commission issued an order requiring the Louisville & Nashville and the Nashville, Chattanooga & St. Louis " to cease and desist, on or before May 1, 1915, and thereafter to abstain, from maintaining a practice whereby they refuse to switch interstate competitive traffic to and from the tracks of the Tennessee Central Railroad Company, at Nashville, Tenn., on the same terms as interstate noncompetitive traffic, while interchanging both kinds of said traffic on the same terms with each other, as said practice is found by the Commission in its said report to be unjustly discriminatory." And further

ordered them to put into effect " rates and charges which shall not be different than they contemporaneously maintain with respect to similar shipments to and from their respective tracks in said city, as said relation is found by the Commission in its said report to be nondiscriminatory." (Rec. Vol. II, pp. 589–590.) This is the order attacked in this proceeding.

THE STATUTE.

The pertinent part of section 3 of the Act to Regulate Commerce provides:

> Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business. (24 Stat. 379, 380.)

ARGUMENT.

Appellants preserved in the assignments of error the single contention, that their joint agency contemplates no " interchange of traffic " between them, but that each performs its own switching.

In their briefs, however, other contentions are made. (*Louisville & Nashville Railroad Company's Brief*, p. 34.)

The Government maintains that all the questions raised are foreclosed by the decisions of this court.

The questions presented in this case have already been determined by this court.

No extended argument of this case is proper, because this court has already, we submit, not only (*a*) settled the principles involved (*Pennsylvania Company* v. *United States*, 236 U. S., 351), but has also (*b*) applied those principles to the facts presented by this record. (*Louisville & Nashville Railroad Company* v. *United States*, 238 U. S., 1.)

(*a*) In the former case, it is again announced, with citation of numerous cases, that discrimination is a question of fact for the determination of the Commission (p. 361); that transportation similar to that involved in this case comes within section 3 of the act to regulate commerce as amended (pp. 363–364); that to require such interchange is not a taking of property without due process of law (p. 369), and does not require the carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business (pp. 366, 369).

> It follows that the provisions of section 3 of the act must be read in connection with the amendments and subsequent provisions, which show that transportation as used in the *act covers the entire carriage and serv-*

> *ices in connection with the receipt and delivery of property transported.* There can be no question that when the Pennsylvania Railroad used these terminal facilities in connection with the receipt and delivery of carload freight transported in interstate traffic it was subject to the provisions of the act, and it was obliged as a common carrier in that capacity to afford all reasonable, proper, and equal facilities for the interchange of traffic with connecting lines and for the receiving, forwarding, and delivering of property to and from its own lines and such connecting lines, and was obliged not to discriminate in rates and charges between such connecting lines. By the amendments to the act, the facilities for *delivering freight of a terminal character are brought within the terms of the transportation to be regulated.* (*Pennsylvania Company* v. *United States,* 236 U. S., 351, 363.) [Italics ours.]

(*b*) In the case of the *Louisville & Nashville Railroad Company* v. *United States* (238 U. S., 1), the record and the issues before the court were substantially the same as presented in this case, and the judgment there is decisive here. It is true that in the former case only the reports of the Commission were before this court, while the record now contains both the reports of the Commission and the evidence taken before it. Nevertheless, the evidence before the Commission and its findings of fact were substantially the same in both cases.

Now, as then, appellants argue to uphold their device of a " joint agency " as a technical means to avoid furnishing " facilities for the interchange of traffic " to the Tennessee Central. That the issue and the argument are the same clearly appears from a comparison of the following excerpts from their briefs in the two cases.

On page 34 of the brief of the Louisville & Nashville in the instant case, the proposition is thus stated:

> Each plaintiff pays for and through the joint agency performs the service incident to switching its cars between the point of interchange and the industry in the case of every car which is hauled inbound or outbound over its tracks. Accordingly, neither switches for the other nor discriminates against the Tennessee Central in refusing to switch for it.

In their briefs in the former case (*Louisville & Nashville Railroad Company* v. *United States*, 238 U. S. 1) the corresponding issue was thus expressed:

> Inasmuch as the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway do not, therefore, switch for each other, but switch for themselves through the joint terminal arrangement, any idea that there is any discrimination, either just or unjust, in refusing to switch—that is to say, originate or deliver—traffic of the Tennessee Central Railroad is preposterous. (Brief, p. 59.)

> Each of these companies is to all intents and purposes the owner and operator for its own account of all of the joint facilities involved. (Second Reply Brief, p. 36.)

Not only was the issue now advanced made and insisted upon by appellants in the former case, but, as will be seen from an examination of the record, was given careful consideration by the Commission, the District Court, and this court.

The respective interests of appellants in the terminal property, the joint agency and its method of operation were described in detail in both the report of the Commission and the decision of the District Court. After consideration of these facts, the District Court reached the following conclusion:

> After careful consideration of the evidential facts set forth in the report of the Commission in reference to the switching practice of the petitioners at Nashville, without determining the weight given to such facts, when separately considered, we are of opinion that such facts, when considered as a whole, afford substantial evidence supporting the conclusion of the Commission that such switching practice, which in effect prohibited the interswitching of coal to and from the tracks of the Tennessee Central Railroad, was unreasonably and unjustly discriminatory, * * *. (*Louisville & Nashville Railroad Company* v. *United States,* 216 Fed. 672, 683.)

This court adopted the statements of facts of the Commission and the District Court, using same as the basis of its decision.

> The facts involved have been so fully stated by the Commission (28 I. C. C. 533) and by the court below (216 Fed. Rep. 672) that it is unnecessary here to repeat them. (*Louisville & Nashville Railroad Company* v. *United States,* 238 U. S. 1, 10.)

With these facts before it, this court looked beyond the mere form of the arrangement to the substance, and held:

> In this case the controlling feature of the Commission's order is the prohibition against discrimination. It was based upon the fact that the appellants were at the present time furnishing switching service to each other on *all* business, and to the Tennessee Central on all except coal and competitive business. As long as the yard remained open and was used as a facility for switching purposes the Commission had the power to pass an order—not only prohibiting discrimination—but requiring the appellants to furnish equal facilities "to all persons and corporations without undue preference to any particular class of persons." (*Louisville & Nashville Railroad Company* v. *United States,* 238 U. S., 1, 20.)

In the instant case, the District Court and the Commission have likewise disregarded form for substance.

> And, viewed in its fundamental aspect, and considered with reference to its ultimate effect, we entirely concur in the conclusion of the Commission that such joint switching operation " is essentially the same as a reciprocal switching arrangement," constituting a facility for the interchange of traffic between the lines of the two railroads, within the meaning of the second paragraph of section 3 of the Interstate Commerce Act. That each railroad does not separately switch for the other, but that such switching operations are carried on jointly, is not, in our opinion, material. If it were, all reciprocal switching operations carried on by two railroads at any connecting point of several carriers could be easily put beyond the reach of the act, and its remedial purpose defeated, by the simple device of employing a joint agency to do such reciprocal switching. The controlling test of the statute, however, lies in the nature of the work done, rather than in the particular device employed or the names applied to those engaged in it. See, by analogy, United States v. Chicago Railroad, 237 U. S., 410, 413, 35 Sup. Ct., 634, 59 L. Ed., 1023. (*Louisville & Nashville Railroad Company* v. *United States,* 227 Fed., 258, 269.)

Appellants claim that the decision in the case of *Louisville & Nashville Railroad Company* v. *United States* (238 U. S. 1) does not foreclose the questions raised in this case " for the reason that the

case there decided was entirely different from the one here presented." They cite but a single finding of the Commission to support this broad statement. This finding had reference to the independent operation of certain individually owned tracks. They point, however, to no specific evidence in the record to show that it is incorrect, but rely upon mere assertion. We submit that it is supported by the record. (Rec. Vol. II, pp. 319, 424, 434.)

Be this as it may, the point is immaterial, since the conclusions of the Commission, the District Court, and this court were based, not upon such incidental fact, but upon the broad proposition and main contention that it was discriminatory to refuse to interchange competitive traffic with the Tennessee Central while at the same time, through their joint agency, " furnishing switching service to each other on *all* business, and to the Tennessee Central on all except coal and competitive business." (*Louisville & Nashville Railroad Company* v. *United States,* 238 U. S. 1, 20.)

> Having made the yard a facility for many purposes and to many patrons, such railroad facility is within the provisions of section 3 of the statute which prohibits the facility from being used in such manner as to discriminate against patrons and commodities. The carriers can not say that the yard is a facility open for the switching of cotton and wheat and lumber, but can not be used as a facility for the switching of coal. Whatever may have been the rights of the carriers

in the first instance; whatever may be the case if the yard was put back under the protection of the proviso to section 3, the appellants can not open the yard for most switching purposes and then debar a particular shipper from a privilege granted the great mass of the public. In substance that would be to discriminate not only against the tendering railroad, but also against the commodity which is excluded from a service performed for others. (*Louisville & Nashville Railroad Company* v. *United States*, 238 U. S. 1, 19.)

CONCLUSION.

The decree of the District Court should be affirmed.

Respectfully submitted.

E. MARVIN UNDERWOOD,
Assistant Attorney General.

OCTOBER, 1916.

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NASHVILLE SWITCHING CASES

No. 290.

In the Supreme Court of the United States

OCTOBER TERM, 1916.

LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL.,
APPELLANTS,

v.

UNITED STATES OF AMERICA ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

JOSEPH W. FOLK,
Counsel for the Interstate Commerce Commission.

SYNOPSIS AND INDEX.

TABLE OF CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

LOUISVILLE & NASHVILLE RAILROAD COMPANY et al., appellants, v. UNITED STATES OF AMERICA ET AL., APPELLEES. } No. 290.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

This is an appeal from a decree of the United States District Court for the Middle District of Tennessee, denying a motion and dismissing a petition for an interlocutory injunction against an order of the Interstate Commerce Commission, concerning switching practices at Nashville, Tenn.

The order in question was entered by the Commission on February 1, 1915, in *City of Nashville et al.* v. *Louisville & N. R. Co. et al.*, docket No. 6484, 33 I. C. C. 76. That order, *inter alia*, required the Louisville & Nashville Railroad Company, hereinafter called the Louisville Company, the Nashville, Chattanooga & St. Louis Railway, hereinafter

called the Nashville Company, and the Louisville & Nashville Terminal Company, hereinafter called the Terminal Company, to cease and desist—

> * * * *from maintaining a practice whereby they refuse to switch interstate competitive traffic* to and from the tracks of the Tennessee Central Railroad Company [hereinafter called the Tennessee Central] at Nashville, Tenn., *on the same terms as interstate noncompetitive traffic,* while interchanging both kinds of said traffic on the same terms with each other, as said practice is found by the Commission in its said report to be unjustly discriminatory. [Italics ours.]

The facts upon which the order in controversy was based were developed in a full hearing before the Commission, at which elaborate and comprehensive exhibits were offered and many witnesses were heard. The report of the Commission is found in the Record, Volume II, pages 571–588. A statement of the facts is also found in the opinion of the District Court, Record, Volume I, pages 59–69. Counsel for the appellants have adopted this statement of facts by the court, and printed it in full in their brief. As the statement is full and substantially correct, we shall call attention only to a few significant facts found in the record.

(*a*) Prior to August 15, 1900, the Louisville Company and the Nashville Company severally owned and operated their own terminals at Nashville and each company switched over its terminal

tracks cars for the other company at the published rate of $2 per car, Record, Volume II, page 390, without any distinction, or difference in charge, between competitive and noncompetitive traffic.

(*b*) After the completion of the present terminals at Nashville, secured in the manner set forth in the statement of facts referred to, the appellants continued the operation of the terminals—part now owned separately and part owned jointly—by a joint arrangement provided for in the contract of August 15, 1900, Record, Volume II, page 378. This contract provides, *inter alia*, for the care and control of the union station, and of a designated territory called the terminals, by a superintendent chosen by the appellants acting with the respective general managers of each company. These three officers are designated a "board of control" and, for convenient reference and for the keeping of the accounts of the constituent members, the property is known as "Nashville Terminals." The equipment, engines, etc., and the employees required for the terminal operation are all furnished by the appellants, as they were before the contract was made. Mr. Keeble, one of the counsel for the Louisville Company, who was a witness for the appellants before the Commission, gave this summary statement concerning this arrangement, in answer to a question by Mr. Jouett, Record, Vol. II, p. 289:

> Mr. JOUETT. What do you understand is meant by the term "Nashville Terminal

> Company" ? Is that a corporation or partnership, or anything more than a mere joint organization?
>
> Mr. KEEBLE. That was nothing more nor less than a name used to designate the terminal limits of this joint operation. That is not the name of a corporation; it is a mere designation of the territory covered by this mutual arrangement, and has been so decided by our courts, by many decisions, that the two railroads are jointly responsible for everything that happens there. An employee of the Nashville Terminal Company is not an employee of the terminal company, but an employee of the two railroads, * * *.

The Commission made the following findings of fact:

> (*a*) The Louisville & Nashville will switch competitive coal and other competitive traffic to and from the Tennessee Central, but only at the local rates between Nashville and Overton, Tenn., which are the rates between Nashville and Vine Hill, by intermediate application. The interchange is usually effected, however, at Shops Junction, and over the rails of the Nashville, Chattanooga & St. Louis. Record, Vol. II, p. 577.
>
> (*b*) The terminal tariffs of both roads publish service by the Nashville Terminals and provide that " there is no switching charge to or from locations on tracks of the Nashville Terminals, within the switching limits, on freight traffic, carloads, from or destined to Nashville " over either road,

"*regardless of whether such traffic is from or destined to competitive or noncompetitive points.*" [Italics ours.] Record, Vol. II, p. 576.

(*c*) During 1907, both roads began to interchange with the Tennessee Central all noncompetitive traffic, except coal traffic, at a charge of $3 per car. Noncompetitive traffic is defined as traffic between Nashville and points served by only one railroad into Nashville, or points served by two or more railroads into Nashville for which, however, one road can maintain rates which the others can not meet. The interchange is effected at Shops Junction. Record, Vol. II, p. 576.

(*d*) The rates applied to this switching [competitive traffic from and to Tennessee Central] by the Louisville & Nashville total from $12 to $36 per car; the Nashville, Chattanooga & St. Louis rates from $7 to $36 per car; * * *. Record, Vol. II, p. 577.

(*e*) The cost to the Nashville Terminals of switching competitive Tennessee Central traffic is the same as the cost of switching noncompetitive traffic. Record, Vol. II, p. 579.

(*f*) We do not find that the conditions of interchange of traffic between defendants' lines and the Tennessee Central differ substantially from the conditions of interchange between defendants' lines. Record, Vol. II, p. 582.

(*g*) The Louisville & Nashville interswitches competitive and noncompetitive

traffic on the same terms with other carriers at several other points, notably Memphis, Tenn., and Birmingham, Ala.; while the Nashville, Chattanooga & St. Louis admittedly interswitches both kinds of traffic at the same rates with all connections at all points of connection with other carriers, except Nashville and Lebanon, Tenn., where it connects with the Tennessee Central. Record, Vol. II, pp. 584–585.

(*h*) * * * there are approximately 240 industries located exclusively on their [appellants'] rails, equipped with sidings that will accommodate approximately 2,350 cars, as compared with 100 industries equipped with sidings accommodating not over 700 cars, located exclusively on the rails of the Tennessee Central, * * *. Record, Vol. II, p. 583.

(*i*) The virtually prohibitive charges imposed by defendants for switching competitive Tennessee Central traffic at Nashville cause Nashville shippers little direct pecuniary loss. Industries located on any of the three lines can avoid the switching charges imposed by the others by shipping over the line on which they are located. *They are subject, however, to all the disadvantages of service by a single railroad.* Shipments are frequently misrouted. If the railroads are shown to be at fault, delivery is made by drays at the railroad's expense, but only after the consignee has prepaid all charges, including drayage charges, and provided the

consignee has notified the railroad of the error in routing before accepting the shipment. Delivery is delayed, and frequently goods are damaged by drayage. Lumber merchants located on defendants' lines can not profitably take advantage of the milling-in-transit service accorded at Nashville by the Tennessee Central. Shipments may be delayed because of a car shortage on one line, although another line has a surplus of cars. Industries located on one line lose customers at other points who prefer shipment over the other lines. *These disadvantages to shippers affect Nashville as a city and hinder its growth as an industrial center.* [Italics ours.] Record, Vol. II, pp. 586–587.

(*j*) The only use of defendants' "tracks or terminal facilities" asked by complainants for the Tennessee Central is the use incidental to the movement of Tennessee Central cars *by defendants* to and from industries on defendants' tracks. No use by Tennessee Central trains is asked, nor any use of defendants' freight depots or team or storage tracks. [Italics ours.] Record, Vol. II, p. 585.

The Commission concluded:

Under all of the circumstances disclosed we are of the opinion *and find* that defendants' refusal to switch competitive traffic to and from the Tennessee Central at Nashville *on the same terms as noncompetitive traffic,* while interchanging both kinds of traffic on

> the same terms with each other, *is unjustly discriminatory,* * * *. [Italics ours.] Record, Vol. II, p. 587.

QUESTION INVOLVED.

Counsel for appellants, in their brief, pp. 1–2, say: "Only a single question is involved and that is one of law." This they limit to the question whether the joint ownership and operation of the terminals constitutes a "switching for each other" "which requires them to switch for a third." On page 24 of the same brief, under the heading "Switching Competitive Traffic," counsel say:

> This is what the Commission orders the appellants to do for the Tennessee Central (Vol. II, p. 589) and it is this, that they are here resisting, whether or not they should switch this traffic, *being the sole question in the case.* [Italics ours.]

This is not strictly correct. The question is whether appellants may refuse to switch competitive traffic to and from the Tennessee Central *on the same terms* as noncompetitive traffic *while interchanging both kinds of traffic on the same terms with each other.* As stated by counsel for appellants, brief, p. 53: "This is a discriminating case, that being the sole ground of the Commission's order." And the discrimination condemned is "the refusal to switch competitive traffic * * * *on the same terms as noncompetitive traffic,*" while

switching both kinds of traffic on the same terms with each other.

As no complaint is made as to the procedure before the Commission, or that there was not a full hearing, and as no question is raised as to the essential facts supporting the order, the sole question, as we regard it, is: *Did the Commission have power to make the order in question?* Section 3 of the act provides:

> That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular * * * *locality, or any particular description of traffic in any respect whatsoever,* or to subject any particular * * * *locality, or any particular description of traffic,* to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. [Italics ours.]
>
> Every [such] common carrier * * * shall, according to their respective powers, afford * * * equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of * * * property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

ARGUMENT.

I.

THE COMMISSION'S FINDINGS OF FACT, IF BASED UPON SUBSTANTIAL EVIDENCE, ARE CONCLUSIVE.

The question of unjust discrimination, as presented in this case, is one of fact, even though the evidence may be undisputed. *United States* v. *Louisville & N. R. Co.*, 235 U. S. 314; *Pennsylvania Co.* v. *United States*, 236 U. S. 351.

Section 15 of the act, as amended, empowers the Commission to deal with preferential and discriminatory regulations of carriers, as well as with rates. *Int. Com. Com.* v. *Illinois Central R. Co.*, 215 U. S. 452.

Courts will not substitute their own conclusions of fact for those of the Commission, when there is substantial evidence before the Commission tending to support its findings. *Int. Com. Com.* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235; *Atchison, T. & S. F. Ry. Co.* v. *United States*, 232 U. S. 199; *United States* v. *Louisville & N. R. Co.*, 235 U. S. 314.

II.

THE FINDING OF THE COMMISSION THAT THE LOUISVILLE COMPANY AND THE NASHVILLE COMPANY WERE IN EFFECT SWITCHING FOR EACH OTHER WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The third vice president of the Louisville Company, in a letter to the commissioner of the traffic bureau of Nashville, Complainants' Exhibit No. 8, Record, Vol. II, p. 165, referred to the relations

between the Louisville Company and the Nashville Company as follows:

> You, of course, are aware that the greater portion of the terminals of the N. C. & St. L. Ry. and of the L. & N. R. R. are either jointly owned or are pooled; that *the individual facilities of each of the two lines within the Nashville switching limits are approximately equal;* and that the whole of the facilities are operated in joint interest. [Italics ours.]

That the situation described as existing between the Louisville Company and the Nashville Company was recognized by those carriers as constituting a reciprocal switching arrangement is evident from the definition of " reciprocal switching arrangements " later given by the third vice president, in the same letter, Record, Vol. II, p. 167, as follows:

> Reciprocal switching arrangements between railroads means what the term, on its face, implies; that is, *approximately equal service and facilities are to be afforded by each of the two or more interested lines.* Reciprocal switching arrangements necessarily must mean that the service performed by each for the other shall, to an approximately equal extent, justify the same. [Italics ours.]

Prior to August 15, 1900, the Louisville Company and the Nashville Company switched for

each other at a charge of $2 per car. Record, Vol. II, pp. 390, 433. Apparently for no other purpose than "for economy and to expedite the handling of the business," Record, Vol. II, p. 387, the carriers on that date adopted the expedient known as the "Nashville Terminals." Record, Vol. II, p. 378. The switching practice thereafter observed by appellants was described by the superintendent of terminals, Record, Vol. II, p. 386, as follows:

> The cars of both roads are handled together by the same switching crews; in other words, whenever we have a run to make the terminal engine and crew picks up all cars that are ready to go in that direction without any distinction being made as to whether it is Nashville, Chattanooga & St. Louis or Louisville & Nashville business.

It is therefore apparent that, while the Louisville Company and the Nashville Company, after the inauguration of the joint arrangement, continued as theretofore to perform a switching service for each other, that service, after the establishment of the Nashville Terminals, was rendered by the common agency of both, instead of individually by each for the other, as previously had been done. In other words, the carriers, after the establishment of the terminals, instead of operating with their own respective crews the engines used in interchange, merely supplied those engines, and they were directed or controlled by their common agent.

In this connection the following colloquy between the superintendent of Nashville Terminals and Mr. Baxter, Record, Vol. II, p. 434, is illuminative:

> Mr. BAXTER. And it does not matter whether it is the Louisville & Nashville engine that takes that car at the station or Nashville, Chattanooga & St. Louis engine that handles it?
>
> Mr. BRUCE. No, sir.
>
> Mr. BAXTER. In fact, your Nashville, Chattanooga & St. Louis engines do as much switching in the Louisville & Nashville Railroad yards as do the Louisville & Nashville Railroad yard engines proper, do they not?
>
> Mr. BRUCE. I can probably explain that, Mr. Baxter, better by saying that "each road, the Louisville & Nashville and the Nashville, Chattanooga & St. Louis, assigns its proportion of the engines needed for yard service to the Nashville Terminals, and we use those engines regardless of whose business they are handling or whose tracks they are working on."
>
> Mr. BAXTER. And you use them regardless of location?
>
> Mr. BRUCE. Or regardless of location; yes.
>
> Mr. BAXTER. So a Louisville & Nashville engine will switch in the Nashville, Chattanooga & St. Louis yard on its private tracks, and it will switch on the Louisville & Nashville private tracks ,and it will handle a car on the terminal tracks?
>
> Mr. BRUCE. Yes, sir.

Mr. BAXTER. And the same is true of the Nashville, Chattanooga & St. Louis Railway?

Mr. BRUCE. Yes, sir.

Appellants contend that the Nashville Terminals acts in every instance as the agent of the carrier performing the line service, and cite, in support of that contention, the practice observed by the Terminals in the apportionment of its operating expenses. But if the joint agency did not exist, the carrier switching the traffic to or from the industry on its line would bill that service against the carrier making the road haul. In other words, the line carrier merely pays its proportion of the switching service performed by the Nashville Terminals instead of the switching charge which it otherwise would pay to the carrier performing that service. The joint agent, then, must be held to act for the carrier which would perform the switching service in the absence of the joint arrangement.

It is apparent, therefore, that the mere intervention of the joint agency in no wise changed the relations theretofore existing between the Louisville Company and the Nashville Company nor the legal effect of the services rendered by those carriers for each other.

In the light of the foregoing evidence, it is submitted as the merest casuistry for appellants to contend that the findings of the Commission, with respect to a reciprocal switching arrangement between the Louisville Company and the Nashville Company, were not supported by the record.

The three judges who decided this case in the District Court found not merely that there was substantial evidence to support the findings of the Commission but expressly approved its finding that appellants switched for each other. In this connection it was said, Record, Vol. I, p. 70:

> That each railroad does not separately switch for the other, but that such switching operations are carried on jointly is not, in our opinion, material. If it were, all reciprocal switching operations carried on by two railroads at any connecting point of several carriers could be easily put beyond the reach of the act and its remedial purpose defeated by the simple device of employing a joint agency to do such reciprocal switching. The controlling test of the statute, however, lies in the nature of the work done rather than in the particular device employed or the names applied to those engaged in it.

III.

THE FINDING OF THE COMMISSION THAT THE LOUISVILLE COMPANY AND THE NASHVILLE COMPANY WERE IN EFFECT SWITCHING FOR EACH OTHER WAS SUPPORTED BY THE DECISION OF THIS COURT IN LOUISVILLE & N. R. CO. v. UNITED STATES, 238 U. S. 1.

In *Louisville & N. R. Co.* v. *United States,* 238 U. S. 1, the precise questions here involved were heard and determined. This court in that case, speaking through Mr. Justice Lamar, said, page 17:

> They claimed that they had the right to the exclusive use of their own terminals and could not be required to switch cars loaded

with " coal *or competitive freight* " to and from the Tennessee Central. [Italics ours.]

And again stating the issues, the court said, page 18:

> The appellants attack this order as being void, because (1) it compels them to admit the Tennessee Central into an arrangement for operating joint terminals at Nashville under a contract guaranteeing interest on bonds and prorating operating expenses; (2) takes their property in the yards without due process of law; (3) violates section 15 of the commerce act (34 Stat. 589) in compelling them, in effect, to make through routes and joint rates with the Tennessee Central when the appellants themselves have already established " a reasonable and satisfactory through route "; and (4) violates section 3 of the same act, which, after requiring carriers to afford equal facilities for the interchange of traffic, declares that the section " shall not be construed as requiring any such carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

And then determining these questions, the court continued:

> These objections treat the order as being broader than its terms. The commission did not, as in *Waverly Oil Works Co.* v. *Penna. R. R.*, 28 I. C. C. 621, 627, pass upon the question as to what was a proper switching charge as affected by the rental of the

yard and the cost of operation. Neither did it direct the appellants to establish a joint rate and a through route with the Tennessee Central. Neither did it order the appellants to give the use of their terminals to the Tennessee Central, but only required them to render to the latter the same service that each of the appellants furnishes the other in switching cars to industries located in and near the yard.

Disregarding the complication arising out of joint ownership and the fact that each of the appellants switches for the other, it will be seen that the Commission is not dealing with an original proposition but with a condition brought about by the appellants themselves. Under the provisions of the commerce act, 24 Stat. 380, the reciprocal arrangement between the two appellants would not give them a right to discriminate against any person or "particular description of traffic."

Again the court said, page 19:

Having made the yard a facility for many purposes and to many patrons, such railroad facility is within the provisions of section 3 of the statute which prohibits the facility from being used in such manner as to discriminate against patrons and commodities. The carriers can not say that the yard is a facility open for the switching of cotton and wheat and lumber, but can not be used as a facility for the switching of coal. * * * In substance that would be to discriminate

> not only against the tendering railroad, but also against the commodity which is excluded from a service performed for others.

And on page 20:

> The question, as to power of the Commission to make this part of the order, is settled by the decision in *Pennsylvania Company* v. *United States,* 236 U. S., 351, recently decided. * * * But the alleged differences do not serve to take the present case out of the principle announced in that just cited. For in this order the prohibition against the existing practice and the requirement to furnish equal facilities come to the same thing.
>
> In this case the controlling feature of the Commission's order is the prohibition against discrimination. It was based upon the fact that the appellants were at the present time furnishing switching service to each other on *all* business, and to the Tennessee Central on all except coal and competitive business. As long as the yard remained open and was used as a facility for switching purposes the Commission had the power to pass an order, not only prohibiting discrimination, but requiring the appellants to furnish equal facilities " to all persons and corporations without undue preference to any particular class of persons."

In seeking to revive the issue, appellants urge that all the facts were not before the court.

The material facts of record in the two cases are essentially the same, although more in detail in this

record. But so far as the question here involved is concerned the Commission says that it "discloses nothing to change our former conclusion." The responsibility of appellants for the practice in the yards and the discrimination condemned is admitted.

It is therefore submitted that the findings of the Commission here under consideration, and the order founded thereupon, are supported by the decision in the former case, and should be sustained.

IV.

DISCRIMINATION BY THE NASHVILLE TERMINALS, THE JOINT AGENT OF APPELLANTS, IS NO MORE TO BE JUSTIFIED UNDER THE ACT THAN WOULD BE DISCRIMINATION BY EITHER OF ITS PRINCIPALS.

Appellants virtually admit that if they were individually switching for each other, and at the same time and under like conditions refusing to perform a similar service for the Tennessee Central, their discrimination against the latter carrier would constitute a violation of the Act. How, then, can they justify such a discrimination when effected by their common agent?

Again, if the Nashville Terminals were in fact a terminal company, as that expression is generally understood, it could scarcely deny that its exclusion of the Tennessee Central from privileges extended to the Louisville Company and the Nashville Company would constitute an unlawful discrimination. *St. Louis, S. & P. R. Co.* v. *P. & P. U. Ry. Co.,* 26 I. C. C. 226, 235–236. Yet ap-

pellants, in effect, contend that their terminal company, by metamorphosis into a "joint agency" has been endowed with a right to discriminate which it otherwise would not possess.

Appellants may not reasonably complain if the joint agency created by them for the purpose of performing terminal services is required to provide without discrimination reasonable, proper, and equal facilities to all carriers requesting of it the performance of such services. The fiction of a separate corporate entity will be disregarded whenever it is insisted upon as a protection to an illegal transaction. *In re Rieger, Kapner & Altmark,* 157 Fed. 609; *Miller & Lux* v. *East Side Canal & Irrigation Co.,* 211 U. S. 293; *Lehigh Mining & Mfg. Co.* v. *Kelley,* 160 U. S. 327; *Gas Co.* v. *West,* 50 Iowa 16; *Booth* v. *Bunce,* 33 N. Y. 139.

The order of the Commission has not required the dissolution of the Nashville Terminals, nor has it exacted that the Tennessee Central be admitted to that organization. It has merely required that appellants place the Tennessee Central on an equal footing with the Louisville Company and the Nashville Company in the matter of the interchange of traffic at Nashville.

That appellants, through their common agency, may not deny to the Tennessee Central a privilege which they individually might be required to give that carrier is submitted as so obvious as not to require elaboration.

V.

THE NASHVILLE TERMINALS, IF GIVEN THE EFFECT APPELLANTS CLAIM FOR IT, WOULD CONSTITUTE A MONOPOLY; AND THE COMMISSION PROPERLY REFUSED TO GIVE IT THAT EFFECT.

The Nashville Terminals insists upon its right to refuse to switch for the Tennessee Central any traffic which might have come in or which might go out over the line of either of its principals. Yet, in the absence of the joint arrangement, neither of those principals might lawfully refuse to switch for the Tennessee Central merely because the traffic offered might have come in or might go out over its own lines. The Tennessee Central, therefore, at points served only by it and one of the other carriers might, in the absence of the joint arrangement, compete on equal terms with those carriers for traffic destined to Nashville. Here, then, is a clear suppression of competition, a flagrant discrimination against competitive traffic. That discrimination was alleged in the complaint before the Commission to have resulted from the concerted action of appellants.

Whether or not each of the appellants individually might lawfully refuse to switch competitive traffic for the Tennessee Central, if neither of those carriers were interchanging traffic with the other, was a question not considered by the Commission. But the Commission having found as a matter of fact that appellants were switching for each other both competitive and noncompetitive traffic upon

equal terms, that they were jointly treating as competitive traffic any which might have come in or which might go out over the line of either of them, and that they were refusing to interchange like traffic with the Tennessee Central, was justified in concluding that appellants were combining against such competitive traffic coming in or going out over the lines of that carrier.

VI.

THE LIMITATION UPON THE POWER OF THE COMMISSION IN ESTABLISHING THROUGH ROUTES, UNDER SECTION 15, IS NOT APPLICABLE IN THIS CASE.

Appellants claim that the order in controversy requires them to short-haul their own lines on all competitive traffice, in violation of the provisions of section 15. This contention was made before the Commission, and the Commission said:

> This provision, however, relates exclusively to the power of the Commission to establish through routes, and, since orders against discrimination by carriers between their connections in the matter of through routes are enforceable without the establishment of through routes by the Commission, does not apply to the provisions of section 3 either expressly or by necessary implication. Defendants short-haul their respective lines in favor of each other, and in our opinion can not under the act as now amended refuse to interchange traffic with the Tennessee Central solely on the ground that they would thereby short-haul their own lines. Record, Vol. II, p. 582.

This contention was also made in this court upon the same state of facts in *L. & N. R. Co.* v. *United States,* 238 U. S. 1, and this court distinctly sustained the view taken by the Commission, as appears from the extracts from the opinion quoted.

This is not a proceeding involving the establishing of a through route. The issue here, as stated by counsel, is one of *discrimination only.* And this court clearly decided that the provision in section 15 did not apply in such a case.

VII.

THE COMMISSION HAS POWER TO REQUIRE THE REMOVAL OF DISCRIMINATION IN WHATSOEVER GUISE IT MAY APPEAR.

It is conceded that the Nashville Terminals does discriminate against the Tennessee Central and its shippers in favor of appellants, but it is urged that such discrimination is not undue or unreasonable; that the Nashville Terminals, having been created by appellants, has the right to favor them to the detriment of the Tennessee Central.

Congress must be presumed, however, to have realized that carriers would resort to every conceivable device to effect discrimination in evasion of the act; and its intention that substance rather than form should control the application of the statute is evident from its use in the act of such phrases as "directly or indirectly," " in any respect whatsoever " and " any device whatever."

As said by Mr. Justice Hughes, speaking for this court in the *Shreveport Case,* 234 U. S. 342, 356:

> It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach.

Appellants admit that the Commission would have the power to require the abatement of any discrimination resulting from their refusal individually to extend to the Tennessee Central a privilege which they individually extended to each other. It is therefore difficult to understand the theory upon which they insist that the Commission is powerless to abate a correspondingly discriminative practice, merely because the discrimination is effected by their common agent.

It is a cardinal principle of the law that an act directly forbidden may not be indirectly accomplished.

The difference between the discrimination which the Commission has here attempted to abate and that which appellants concede it might abate is a difference merely in degree and form. The discrimination here accomplished through the instrumentality of the Nashville Terminals is no less a violation of the law than would be the same discrimination if effected individually by the carriers parties to the joint arrangement.

It is further to be noted that the discrimination required in this case to be removed is not merely a discrimination against the Tennessee Central, and against competitive traffic as in favor of non-competitive traffic, but a discrimination against the shippers served by the Tennessee Central and against the City of Nashville. *Michigan Central R. Co.* v. *Michigan Railroad Commission*, 236 U. S. 615, 632.

VIII.

THE ORDER OF THE COMMISSION DOES NOT REQUIRE APPELLANTS TO GIVE THE USE OF THEIR TRACKS OR TERMINAL FACILITIES TO ANOTHER CARRIER ENGAGED IN LIKE BUSINESS.

In *Pennsylvania Co.* v. *United States*, 236 U. S. 351, this court held that an order of the Commission requiring the removal of discrimination in the interchange and switching practices of the Pennsylvania Company, at New Castle, Pa., was not an appropriation of the terminals of that carrier. Mr. Justice Day, speaking for the court, in that case, pp. 368–369, said:

> In the present case we think there is no requirement in the order of the Commission amounting to a compulsory taking of the use of the terminals of the Pennsylvania Company by another road within the inhibition of this clause of section 3. The order gives the Rochester road no right to run its cars over the terminals of the Pennsylvania Company or to use or occupy its stations or depots for purposes of its own. There is no requirement that the Rochester Company be permitted to store its cars in

> the yards of the Pennsylvania Company or to make use of its freight houses or other facilities, but simply that the Pennsylvania Company receive and transport the cars of the Rochester Company over its terminals at New Castle in the same manner and with the same facilities that it affords to other railroads connecting with the Pennsylvania Railroad at the same point.

The only material difference between the *New Castle Switching Case* and the case at bar is that the latter involves a contract between appellants which, it is claimed, gives to each of them trackage rights over the terminal lines of the other, whereas no such contract appeared of record in the *New Castle Switching Case*. But in *Louisville & N. R. Co.* v. *United States*, 238 U. S. 1, this court held that the joint arrangement between appellants did not take the case out of the principle announced in the *New Castle Switching Case*, and that the order of the Commission there under consideration, which was substantially the same as the order here involved, did not require appellants to give the use of their terminals to the Tennessee Central.

IX

THE LANGUAGE OF THE THIRD PARAGRAPH OF THE COMMISSION'S ORDER, WHEN READ IN CONNECTION WITH WHAT PRECEDES IT, IS CLEAR, AND HAS RECEIVED INTERPRETATION BY THE APPELLANTS AND BY THE COMMISSION.

The third paragraph of the Commission's order requires the appellants to put in—

> * * * rates and charges which shall not be different than they contemporane-

> ously maintain with respect to similar shipments to and from their respective tracks in said city [Nashville], as said relation is found by the Commission in its said report to be nondiscriminatory.

It is stated in the brief for the Nashville Company, page 35, that—

> It is believed that the invalidity of the order will appear from the impossibility of complying with it without destroying the arrangement between the two companies at Nashville.

The rates which the order requires are rates which avoid the discrimination condemned. It does not have any reference to the amount of the rate to be charged the Tennessee Central, but in effect demands that the rates charged shall not discriminate between competitive and noncompetitive traffic which, aside from this circumstance, is alike.

The appellants had no difficulty in so construing this order. They put the same into effect by a rate of $7.50 per car for switching both competitive and noncompetitive traffic at Nashville. This rate was suspended and its reasonableness was inquired into, upon full hearing, by the Commission. This case was decided June 30, 1916. *Nashville Switching*, 40 I. C. C., 474. In that opinion, the Commission said at page 476:

> The Nashville Terminals' proposed charge of $7.50 for both competitive and noncompetitive traffic would comply with our order

in the *City of Nashville Case,* and the principal question presented is whether it would be reasonable.

The Commission considered a large amount of testimony and found the charge unreasonable, and fixed a maximum rate of $5 per car.

The part of the order which counsel for appellants claim is "rather peculiar language" and "not quite clear" was perfectly understood by the appellants when they put in their rate of $7.50 to comply with the order, and the Commission construed this to be a compliance with the order, leaving only the question of the reasonableness of the rate to be determined.

CONCLUSION.

The evidence before the Commission in this case showed clearly that the Louisville Company and the Nashville Company were interchanging traffic for each other over the Nashville Terminals without distinguishing between competitive and non-competitive traffic, while at the same time refusing to perform a similar service upon like conditions for the Tennessee Central, and that they were thereby discriminating against the Tennessee Central, the shippers served by that carrier, and the City of Nashville. The findings of the Commission were in accordance with and fully supported by this evidence.

The order here under consideration merely requires appellants to cease and desist from the dis-

crimination which the Commission found as a matter of fact to exist. *Louisville & N. R. Co.* v. *United States*, 238 U. S. 1. In other words, so long as the Louisville Company and the Nashville Company shall elect to switch for each other and for the shippers served by both, without discrimination between competitive and noncompetitive traffic, the Commission properly may and should require that they shall perform a similar service under like conditions for the Tennessee Central and its shippers. That such a requirement is within the power of the Commission is clearly sustained by the decision of this court in *Pennsylvania Co.* v. *United States*, 236 U. S. 351.

It is therefore respectfully submitted that the judgment of the District Court should be affirmed.

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